No. 80-877

Supreme Court, U.
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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STEPHEN HOPKINS and DOUGLAS D. DONALD,
Petitioners,

—against—

THE RECTOR, CHURCHWARDENS and VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. KUSHNER
Counsel for Respondent The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York
40 Wall Street
New York, New York 10005
(212) 269-2500

Of Counsel:

COLE & DEITZ
JAMES J. TERRY

QUESTIONS PRESENTED

1) Whether the granting of summary judgment to a religious corporation on its application for permission to sell real property satisfies due process of law where the application is supported by extensive documentary and affidavit evidence, while the parties opposing summary judgment offer no facts of an evidentiary nature which establish the existence of any triable issue of fact.

2) Whether certiorari should properly be granted where no fewer than fifteen judges have already reviewed this case, not one of whom rendered an opinion in favor of petitioners; where petitioners have already caused the respondent Church substantial legal fees and damages by delaying the sale of the property in issue; and where the entire controversy has now become moot by reason of the properties' sale having been consummated.

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This brief is respectfully submitted on behalf of respondents The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York (the "Parish") in opposition to the petition for a writ of certiorari to review the order of the

Appellate Division of the Supreme Court of the State of New York rendered in this proceeding on March 25, 1980.

JURISDICTION

Respondent maintains that the petition is jurisdictionally defective for failure to comply with the provisions of 28 U.S.C. §§1257(3) and 2101(c). See pp. 17-22, infra.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 U.S.C. §2101(c):

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Counter Statement of the Case

A. The Nature of the Proceeding Below

By way of background, the respondent Parish was on the brink of financial disaster less than five years ago, and its financial condition remains precarious to this day. In the proceeding below, the Parish sought leave to sell two parcels of real property which: (a) were no longer necessary for Parish use; (b) imposed a substantial burden upon the Parish's operating budget and would impose an ever greater burden in the future; and (c) would provide the Parish with a needed infusion of money for use in its ongoing community and religious activities. The proposed sale received the unanimous approval of: the Rector and 12 Vestrymen who comprise

the Parish's governing body;[1] the Bishop of the Episcopal Diocese of New York; the Diocesan Standing Committee; and the Attorney General of the State of New York, as representative of the charitable beneficiaries. Only the two objectants opposed.

1/ The Parish, as presently constituted, represents the consolidation of three long-established parishes of the Protestant Episcopal Church in Manhattan. Confronted with sharply rising operating costs unmatched by comparable increases in membership or income in recent years, these parishes suffered combined operating deficits of approximately $343,000 for the year ended December 31, 1975. They thereupon resolved to consolidate into a unified parish to seek solutions to their problems through a new identity, drawing strength from the traditions of each component.

In support of its petition and cross-motion for authorization to sell, the Parish introduced exhaustive documentary evidence, including: (a) appraisals of the properties; (b) respondent's certified financial statements encompassing the entire four-year period of its consolidated existence; (c) summaries of the performance of respondent's investment portfolio as recently as June 30, 1979; and (d) statements of operating income and expenses for the properties, spanning the period from January 1, 1977 through June 30, 1979. This evidence and more accompanied the affidavits of: respondent's Rector, the individual charged with the responsibility to administer church affairs in his parishioners' best interests; respondent's lay treasurer from January 1976 until June 1979 (who

also is a senior vice-president of the Irving Trust Company and manager of its Administrative Services Division); and the lay chairperson of respondent's Buildings Committee (who is also an equity investment analyst in the Real Estate Financing Department of the Metropolitan Life Insurance Company). Each of these knowledgeable professionals expressed the firm opinion -- shared by the overwhelming majority of their fellow parishioners -- that the proposed transaction was essential to respondent's survival and growth.

In contrast, the two objectants (petitioners herein) made no factual showing controverting respondent's. Rather, objectants were content to present affidavits which were purely argumentative in nature and lacking in evidentiary matter.

B. The Decision and Orders of the Courts

At Special Term, the Supreme Court, New York County, rejected objectants' arguments and awarded summary judgment approving the sale. By decision dated October 17, 1979, Justice Alfred M. Ascione granted the Parish's petition and cross-motion, dismissed all objections, and applied cy pres to construe the deeds of both properties so as to permit sale (A 1-23). In a comprehensive analysis, Justice Ascione went beyond the statutory requirement that the proposed sale "promote" the interests of the Church and its members, and held that the facts reveal the sale to be in the best interests of the Parish as presently constituted (A 12-13). He observed that the thrust of objectants'

position was their "continued dissatisfaction" with the consolidation and their "perception of the dismantling of St. George's as a separate entity" (A 12). Finding these fears to be "unwarranted", the Court below concluded:

> "But more importantly, consolidation is a reality and objectants' arguments directed against the effects of consolidation are now irrelevant." (A 13)

The Court granted reformation of the restrictive covenants in the deeds, based on its findings that changed circumstances had made continued operation of the unproductive and unneeded properties impracticable (A 20-21). The Court found that the maintenance costs of the properties had made it "necessary to fall back on petitioner's endowment and other income" to meet rising deficits (A 20).

Justice Ascione reviewed in detail not only the terms of the transaction,

but also the proposed use of the proceeds. He approved the Parish's plan to continue the memorial intended by the Morgans through the following steps:

a. deposit of the proceeds of sale, after payment of broker's fees and related expenses, in an endowment fund to be denominated "The Charles Tracy and Louisa Kirkland Tracy Memorial Fund", to be used in connection with Parish work consistent with the benevolent intentions expressed in the deeds to the properties;

b. utilization of $50,000 from the endowment fund to renovate the Parish's Pierce House facility (adjacent to Memorial House) to accommodate the Jack and Jill School program; and,

c. renaming of the Parish's Calvary House facility, a center of Parish activities, as "Tracy House" (A 20-21).

Objectants appealed from this Order, and on March 25, 1980, the Appellate Division, First Department, unanimously affirmed on the opinion of Justice Ascione.

On April 25, 1980, objectants sought to appeal to the New York Court of Appeals as of right, arguing that they had been deprived of liberty and property without due process of law. By Order dated May 29, 1980, the Court of Appeals dismissed objectants' appeal sua sponte, holding that no substantial constitutional question was directly involved (A 34-35).

Undaunted by the fact that their fellow parishioners, the ecclesiastical authorities, the Attorney General, Special Term, and a unanimous Appellate Division had found their objections

unpersuasive, objectants next sought leave to appeal to the Court of Appeals. They argued that there were no less than eight issues which were novel and of public importance, and which the Court of Appeals must resolve in the interests of substantial justice. That motion, which was opposed by both the Parish and the Attorney General of New York State, was denied on August 29, 1980, in a unanimous Order by the Court of Appeals (A 36). It is that Order -- rendered three months after the determination that no substantial constitutional question was directly involved -- which petitioners herein initially requested this Court to review (Pet. at 1).

On June 20, 1980, objectants moved for an order to vacate the judgment entered by Justice Ascione on the grounds of newly discovered evidence; i.e., an

unsworn report prepared by an accounting firm that objectants retained many months after Justice Ascione's decision, and while the appeal therefrom was pending in the Appellate Division; and a financial statement reflecting the Parish's condition as of December 31, 1979. Objectants had attempted to submit this financial statement on the prior appeal, but the Appellate Division, by Order dated March 25, 1980, had denied their motion to enlarge the record in that respect.

The motion to vacate was submitted at objectants' request to Justice Ascione. Both the Parish and the Attorney General opposed the motion. Thereafter, on July 9, 1980, an Order was entered denying the motion on several different grounds (A 37-44). In a well-reasoned opinion, the Court held, inter alia:

1. No plausible explanation had been offered for objectants' belated presentation of the expert report;

2. The report was "only an optimist's appraisal of hoped-for results which can hardly form the basis for an economic decision of such far reaching implications" to the Parish (A 41);

3. The deficit operations of the properties in issue were not, and could not be, denied;

4. The Parish's good fortune in experiencing exceptional performance on the part of its oil stocks was fortuitous, and offered no reason for ignoring the deficit operations of the properties in question;

5. Objectants' persistent efforts to block the sale were motivated by their

continuing unhappiness with the consolidation of the Parish and what they perceive to be the dismantling of St. George's Church; and,

6. It was doubtful that the result would have been any different had objectants submitted their expert's report on the original motion.

Objectants appealed from this Order as well. However, on November 18, 1980, the Appellate Division, First Department, unanimously affirmed the Order and awarded the Parish its costs and disbursements on the appeal (A 45-46).

The present petition for a writ of certiorari was docketed by objectants on November 28, 1980. After an initial period of confusion (see p. 12, supra), they have determined that the March 25, 1980 Order of the Appellate Division is the

adjudication of which review is sought in this Court.

REASONS FOR DENYING THE WRIT

A. The Petition Is Untimely and Is Therefore Jurisdictionally Defective

As a threshold issue, petitioners herein have failed in their effort to invoke the statutory jurisdiction of this Court. That jurisdiction is granted by 28 U.S.C. §1257, which provides that a final judgment or decree, rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution" of the United States. 28 U.S.C. §1257(3). However, a writ of certiorari may not issue unless the petition therefor is timely filed. (See Rule 22(3) of this Court.) To be timely, such a petition must be docketed within ninety

days following entry of the judgment or decree of which review is sought, unless that time period is extended by a Justice of this Court for an additional sixty days. 28 U.S.C. §2101(c).

It is well established that, because the foregoing time limitations are congressionally prescribed, the untimely filing of a petition creates an incurable jurisdictional defect. Accordingly, this Court has held that an untimely petition must be summarily denied for want of jurisdiction. See, e.g., Department of Banking v. Pink, 317 U.S. 264, 268 (1942); R. Stern & E. Gressman, Supreme Court Practice at 389 (5th ed. 1978) and authorities cited therein.

In the case at bar, petitioners' application has clearly been made more than ninety days following the entry of the only decree capable of invoking this

Court's jurisdiction.[2/] A brief analysis of the pertinent proceedings in this litigation leaves no doubt that the order of the New York Court of Appeals dated May 29, 1980, is the jurisdictionally relevant decree, and that petitioners' failure to seek certiorari therefrom cannot be cured by their belated reliance on any other judicial determination.

2/ Petitioners themselves have demonstrated undue confusion concerning the identity of the order upon which their application is predicated. When their petition was initially docketed on November 28, 1980, they sought issuance of a writ to review the Order of the New York Court of Appeals rendered on August 29, 1980. Pet. at 1. Subsequently, they reversed their course and now assert that the Order to be reviewed is that of the Appellate Division of the New York State Supreme Court entered March 25, 1980--an order which they had not even included in their Appendix. As a matter of law, however, neither of those decrees can support the invocation of this Court's jurisdiction, as we discuss in the text following this footnote.

The original order of the Supreme Court, New York County, approving the sale of the properties and applying cy pres so as to permit their sale, was affirmed on March 25, 1980, by a unanimous Appellate Division, expressly on the opinion rendered below. Inasmuch as the objectants had included, in a short footnote to their brief before the Appellate Division, a reference to claimed rights under the federal and state Constitutions, they endeavored to obtain review of the March 25 order by the Court of Appeals as a matter of right. That Court, ruling sua sponte on May 29, 1980, dismissed the purported appeal as of right and, in so doing, expressly held "that no substantial constitutional question is directly involved." (A 34-35)

Petitioners did not apply for a writ of certiorari from that order, despite

the fact that it was a final adjudication of the alleged constitutional issues by the highest court in New York in which a decision could be had thereon and was thus the relevant adjudication for purposes of this Court's jurisdiction. 28 U.S.C. §1257(3). More than ninety days expired between the entry of the May 29 Order of the Court of Appeals and the docketing of the present petition on November 28. Moreover, even if petitioners had undertaken to obtain an extension of sixty days from a Justice of this Court--thereby reaching the outer limits of timeliness for application for a writ--the petition would have had to be docketed by October 27, 1980, to be timely. Thus, the petition is untimely and jurisdictionally defective.

Its denial is therefore mandated.[3/]

28 U.S.C. §§1257(3), 2101(c).

[3/] Petitioners' initial attempt to bootstrap themselves into this Court's jurisdiction was both disingenuous and unavailing. Their original position that the determination to be reviewed was the August 29, 1980 order of the New York Court of Appeals (Pet. at 1) failed to state a sufficient predicate for jurisdiction under 28 U.S.C. §1257(3). For this second decision by the Court of Appeals merely denied a motion for leave to appeal to that court--a discretionary determination under state procedural law based upon the absence of issuesperceived to be of public significance. The alleged constitutional questions, having been dispositively treated in dismissing the purported appeal as of right three months earlier, played no role in this second adjudication.

Indeed, petitioners admitted as much, both indirectly and directly, at that time. They premised their motion for leave to appeal on Section 5602(a)(1) of the New York Civil Practice Law and Rules, which authorizes an appeal "from an order of the appella division which finally determines the action and which is not appealable as of right" (emphasis added). Thus, petitioners in effect admitted that the March 25 order was not appealable as of right, i.e., that it did not directly involve a substantial constitutional question. Moreover, the same conclusion was admitted directly in their brief on the motion for leave to appeal, wherein they recounted in a footnote their earlier constitutional arguments

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

B. The Decision Below Correctly Granted Summary Judgment, and Petitioners' Challenge Raises No Substantial Question Warranting Review

Even had this Court's jurisdiction been properly invoked, the petition should still be denied for failure to raise a special or important federal question warranting review. For, the alleged constitutional issue asserted by petitioners is no more than a reiteration of their consistently rejected argument that issues of fact exist which preclude the state courts' summary adjudication of the special proceeding.

(FOOTNOTE CONTINUED)

and acknowledged that those arguments had already been adjudicated. They concluded:

> "Appellants [petitioners herein] initially noticed this appeal to this Court as of right, basing the claim or right on the foregoing constitutional issue. The appeal was dismissed by order dated May 29, 1980."

That argument has been repeatedly considered by the New York courts, and each time it has been held that not a single triable issue of fact existed. The two decisio by Special Term--each rendered after an exhaustive analysis of the evidence--were both affirmed by unanimous five-judge panels of the Appellate Division. Moreover, the New York Court of Appeals, ruling sua sponte, found no substantial constitutional question to be directly involved in petitioners' challenge to the original determinations that no factual issues existed. The same tribunal, in the sound exercise of discretion, subsequently denied leave to appeal, thereby rejecting petitioners' argument that the litigation posed novel questions of public importance which merited resolution in the interests of substantial justice. In sum, then,

the insubstantiality of petitioners' claims has been recognized no fewer than six times without a single dissenting voice in any of the New York courts.

This uniformity of decision is demonstrably correct. For, in the course of this proceeding, the Parish presented documentary evidence the veracity of which was unimpeachable. That evidence--real estate appraisals, certified financial statements, operating income and expense statements and investment portfolio statements--established incontrovertibly the fair market value of the properties proposed for sale, the properties' past, present and prospective losses and the continuing operating deficits of the Parish. In addition, Parish religious and lay officials submitted affidavits which described in great detail the imperative reasons requiring sale of the properties,

the lack of the Parish's need for the properties, and the extensive sales effort culminating in acceptance of the highest offer.[4/]

Petitioners, for their part, were content to rely on the documentary evidence presented by the Parish. Men of substance and sophisticated financial experience, they had both the knowledge and the means to obtain their own real estate appraisals, to perform their own inquiry into prospective uses for the properties and to determine on their own

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[4/] Petitioners have never disputed the fact that the Parish accepted the highest offer any prospective purchaser made for these properties. Similarly, the record below is devoid of any claim that these properties were not properly marketed.

the market for the properties.[5/] Instead, petitioners chose to sit back and conjure up feigned issues based on frivolities, irrelevancies, speculations, philosophical convictions and legal conclusions to be drawn from the uncontroverted facts. As the New York courts correctly

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5/ Petitioners urge this Court to consider certain evidence which, they admit, has never become part of the record of this proceeding. See Pet. at 15, 19, 20-21. While some of this evidence was apparently developed through petitioners' efforts, that evidence was not offered to the court until well after the rendering of the Appellate Division decision now sought to be reviewed. Plainly, petitioners cannot attempt to create issues of fact from evidence which has never been included in the factual record of this litigation. Such evidence is not properly before this Court for consideration.

Moreover, that evidence has already been evaluated on its merits in the context of petitioners' motion to vacate the original judgment below, a motion which was denied. Special Term expressly concluded that the evidence had been untimely presented, and that the original result would probably have been no different had petitioners submitted their belated evidence in the first instance (A 37-44). This finding was unanimously affirmed by the Appellate Division (A 45-46).

perceived, petitioners failed to produce evidence creating triable factual issues, while respondent showed that the uncontroverted facts were not susceptible to petitioners' interpretation. In such circumstances, this Court has recognized the propriety of summary adjudication. See First National Bank v. Cities Service Co., 391 U.S. 253 (1968).

Even a brief review of petitioners' claimed issues of fact suffices to bare their inadequacy. The following discussion will analyze the three categories of alleged issues of fact raised in the present petition and earlier presented to the Appellate Division: (a) the Parish's operating deficits; (b) Memorial House; and (c) 175 Third Avenue.

(a) The Parish's operating deficits. Petitioners contend that the Parish's investment policy of concentrating in equity securities, which results in "a minimal dividend return," should be compensated for by allocating "an assumed yield of approximately 10%" to the Parish's income (Pet. at 13-14; emphasis supplied). This is an irrelevant, frivolous argument. There is no dispute about the Parish's concentration in equity investments, with the concomitant risks that inhere in such investments. One cannot "assume" that equity investments will yield any return, let alone a 10% return. It is for this precise reason that the land-heavy but cash-poor Parish urgently sought to sell the properties in issue and to diversify its portfolio.

(b) Memorial House. Petitioners raise three feigned issues here. First, they claim (Pet. at 16) that the appraised

land value of Memorial House was understated, based upon the "averaging" of land values of the comparable sales listed in the appraisal. This argument is specious. Appraisers do not "average" comparable sales; they use judgment and experience to arrive at estimated fair market values. Petitioners, for their own good reasons, chose not to obtain an appraisal. Nor have they advanced any facts suggesting that the properties could be sold for a higher price than the contract price. Clearly, the fair and reasonable value of the properties was not a triable issue in this proceeding.

Second, petitioners claim as a triable issue respondent's failure to explain why Parish activities could not be conducted in Memorial House (Pet. at 17-18). However, they do not deny that the property was not being utilized for any

purpose at the time of the Parish's consolidation. Moreover, they simply overlook the Parish's thorough explanations in the record concerning the inefficiency of Memorial House--especially in terms of energy consumption and allocation of Parish personnel--and the lack of any need for that facility. Petitioners offered no facts suggesting a triable issue in this regard, even failing to assert that tenants could be found to replace those intending to vacate. They contented themselves with speculating that the Jack & Jill pre-school program would be difficult to relocate from Memorial House to the adjoining Pierce House. Yet, Special Term carefully provided that $50,000 of the sales proceeds from the property be devoted to the relocation (A 32); the record contains no claim by petitioners that this sum would not be sufficient to accomplish the move, thereby

enabling the program to continue without interruption. Again, no issue of fact was created.

Third, petitioners claim as a triable issue whether the YMCA would remain as a tenant if encouraged to do so (Pet. at 19-20). The uncontroverted facts show, however, that the YMCA served notice of its intention to terminate its tenancy. Had there been any doubt of that fact, petitioners could easily have made timely inquiry of the YMCA. That they failed to do so speaks volumes. There is no triable issue here.

(c) 175 Third Avenue. Petitioners raise three feigned issues here. First, they claim the existence of a factual dispute over the value of the property and point to the Parish's receipt of a $140,000 offer for it (A. 16-17). However, that amount approximates the contract

price for the property under the proposed transaction. At any rate, on the record below, the Parish fully documented its reasons for rejecting the terms of the $140,000 offer as unfair, unreasonable and unrealistic.[6] Petitioners have not adduced a single fact impugning the propriety of that determination.

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[6] That offer had been made by an individual possessing no prior experience in developing properties and possessing no management organization. Not only did these shortcomings render him an unqualified purchaser, they also raised substantial doubts concerning his ability to close the transaction even if his offer had been accepted. Further, that individual's plans did not contemplate his permitting the Parish's Thrift Shop to continue its operations on the premises. Finally, his plans failed to include adequate safeguards for the protection of the apartment building's elderly tenants. None of these drawbacks, the Parish demonstrated without contradiction, attended the sale submitted for the courts' approval.

Second, petitioners have striven (Pet. at 21-22) to fabricate factual discrepancies between the operating figures for 175 Third Avenue in the Parish's audited financial statements and in its working statements of income and expense. But the Parish demonstrated on the record, without contradiction, that any such difference was attributable to the fact that the audited financial statements were not designed to allocate to the thirteen Parish properties their respective shares of heating costs, a major component of overall expenses.[7/]

7/ Petitioners also seek to create an issue based on the imputing of income to seven apartments occupied by Parish staff. However, the Parish demonstrated that, if it were to seek to rent the apartments to outside parties, it would at the same time be required to make substantial expenditures for extensive repairs and replacements.

Finally, petitioners claim as a triable issue the cost of necessary repairs (Pet. at 22-23). Although they presented absolutely no evidence on this issue, they profess to see a difference between the Parish's estimate of $50,000 to $75,000 and the appraiser's report, which they interpret as suggesting a need only for "extremely minor" repairs. Petitioners fail to observe that the appraiser valued the building--which he described as an "old law tenement"--at only $10,000 and found it to be "in only fair condition at best." Similarly, the appraiser noted that installation of a central heating plant might be necessary, were the property to be sold as an individual parcel. Hence, there was simply no triable issue as to the building's condition and need of costly repairs.

In addition to the foregoing categories of alleged issues of fact, petitioners argue that they were entitled to a hearing in order to cross-examine concerning a possible conflict of interest.[8/] The basis for this purported conflict is the statement by respondent's real estate expert that one of the reasons the Parish found the proposed offer acceptable was that the banking institutions financing the transaction were known to the Parish. The record demonstrates that petitioners have completely distorted this observation, as is evident upon examination of the context from which it was wrenched. Thus, the full statement of the Parish's rationale

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8/ Interestingly, petitioners have pursued this course even after informing the Appellate Division that they would not accuse anyone associated with the Parish of improper conduct on the basis of the record as it then stood. As petitioners have admitted, that record remains unchanged to this day.

was as follows:

> The offer from Little and MacMaster [the proposed purchasers] was ideal from several standpoints. First, it was the highest offer and approximated the appraised value of the property. Second, the offer envisioned an all-cash transaction. Finally, the potential purchaser was known to the Parish as a responsible developer of more than forty-five other properties, cognizant of the needs of the neighborhood and of the present tenants of the apartment building. Little and MacMaster had also arranged financing from banking institutions known to the Parish. For all of the foregoing reasons, the Parish has been very favorably disposed toward the Little and MacMaster offer.

Obviously, the Parish was justifiably concerned with the identities both of the purchaser and of its financing institutions from the standpoint of assuring not only the capability of the

purchaser to make payment, but also the development of the property in a responsible manner. Petitioners do not and cannot deny that these are valid considerations, particularly in light of the Parish's retention of ownership of St. George's Church and other facilities adjoining the property to be sold. Once again, petitioners failed to create triable issues.

As the foregoing analysis indicates, petitioners' claim of constitutional deprivation emerges as insubstantial in the circumstances of this proceeding. It is hardly surprising, then, that petitioners made only fleeting reference to this claim before the courts whose

determinations they now ask this Court to review. It is conceded that no due process argument at all was advanced at Special Term. In the Appellate Division, petitioners' fifty-six page brief was devoted entirely to other arguments, with the single exception of a three-line footnote stating, conclusorily and without explanation, that due process required a hearing.[9/] This relegation of the constitutional issue to the status of a parenthetical afterthought leaves little doubt as to

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9/ Petitioners' attempt to explain away their belated presentation of a constitutional issue (Pet. at 25) rings hollow. Their position appears to be that a constitutional right does not come into existence unitl it has been denied, which plainly cannot be true. Nothing impeded petitioners from presenting to Special Term a claim of due process entitlement to a hearing of their grievances. Yet, petitioners, for their own reasons, elected to rest their case solely upon their construction of the state statutes under which they asserted their standing to object to the proposed transaction.

petitioners' own conception of its substance. Plainly, their arguments do not warrant consideration by this Court.

C. The Controversy Is Now Moot

Finally, the petition should be denied on grounds of mootness. Prior to the filing of the petition, the properties which the New York courts authorized the Parish to liquidate were in fact sold. The issues sought to be raised by the petition have now been rendered academic and, since no justiciable controversy remains, denial is clearly warranted.

Throughout the tortuous path which this litigation has followed since its

inception, the integrity of the original Order of November 13, 1979 (A 24-33) remained constant. That Order, authorizing the Parish to sell the properties and to establish an endowment fund for the proceeds, was never stayed; nor did petitioners seek to stay it or to enjoin the Parish from proceeding in accordance with its terms. Because of the continuing efficacy of that Order, the Parish possessed valid legal authorization to consummate the sale for almost one year.

In the interim, the properties under contract of sale continued to generate substantial deficits and to drain both the

human and the financial resources of the Parish. In addition, the purchasers made known to the Parish that they were ready, willing and able to consummate the transaction. Accordingly, on October 8, 1980, a closing of the sale was conducted. At that juncture, the Parish tendered the deeds of the properties to the purchasers, who in turn accepted the tender and paid the balance of the purchase price over to the Parish. Pursuant to the November 13, 1979 Order, the net proceeds now constitute a fund to be devoted to the furtherance of Parish works.

Thus, well in advance of the filing of the present petition, the Parish divested itself of title to the properties whose disposition is the focal point of that petition. This action was properly taken in strict compliance with the authority conferred by an effective Order of the

Court, which had already withstood the test of repeated appellate scrutiny. The consummation of the sale, in accordance with the judicially approved terms, obviously renders the present application purely academic.

It is the settled practice of this Court to dismiss a matter as moot in circumstances where the respondent's valid exercise of its declared rights has effectively terminated the controversy as to which review is sought. See, e.g., Chandler v. Wise, 307 U.S. 474, 477-78 (1939); 6 Moore's Federal Practice ¶56.27[1] at 56-1555 n.20 (1980).[10/] The same result is appropriate in the case at bar.

10/ The Parish moved unsuccessfully for dismissal of the petitioners' second appeal to the Appellate Division on grounds of mootness, while prevailing on the merits. (See A 45-46.) However, regardless of the criteria for mootness under New York State law, the foregoing authorities demonstrate that the federal standard for an adjudication of mootness is met in the circumstances of this case.

CONCLUSION

The present petition is fatally defective in no fewer than three ways. First, it is untimely and thus fails to invoke the statutory jurisdiction of this Court. Second, it provides no basis for questioning the correctness of the decision sought to be reviewed; no substantial constitutional claim warranting the Court's consideration has been asserted. Finally, the controversy has been mooted by subsequent events. While each of these grounds is independently sufficient to justify denial of the writ, together they leave no doubt as to the proper disposition of the petition at bar.

Accordingly, it is respectfully submitted that the petition for a writ

of certiorari should be denied.

Respectfully submitted,

Robert E. Kushner
Counsel for Respondent
The Rector, Churchwardens
and Vestrymen of the
Parish of Calvary, Holy
Communion and St. George's
in the City of New York
40 Wall Street
New York, New York 10005
(212) 269-2500

Of Counsel:

Cole & Deitz
James J. Terry

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